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DOCKET NO. 82-444

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

GREITZER & LOCKS, et al.,

Petitioners

v.

JOHNS-MANVILLE CORPORATION, et al.,

Respondents

RE: PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

RESPONSE OF PETITIONERS TO MOTION OF RESPONDENTS, JOHNS-MANVILLE CORPORATION AND JOHNS-MANVILLE SALES CORPORATION, TO DEFER CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI DURING PENDENCY OF AUTOMATIC STAY UNDER 11 U.S.C. §362(a)(1)

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Petitioners, Greitzer and Locks, Gene Locks, Martin Greitzer and Neil R. Peterson, by counsel, for their Response to the Motion of Johns-Manville Corporation and Johns-Manville Sales Corporation ("Manville") to Defer Consideration of Petition for Writ of Certiorari During Pendency of Automatic Stay under 11 U.S.C. §362(a)(1), state as follows:

A. OVERVIEW OF CASE

I. FACTUAL BACKGROUND

In the Eastern District of Virginia, there are approximately 300 asbestos plaintiffs suing Manville and a number of other manufacturers and distributors, jointly and severally, for personal injury or wrongful death. Many of these cases are now in their sixth year. In the great majority of instances the plaintiffs worked at either a United States Navy facility in Portsmouth, Virginia (called the Norfolk Naval Shipyard), or at a private shipyard in Newport News, Virginia. In nearly every case, the worker's asbestos related disability has been long and firmly established under the Federal Employees Compensation Act (as to federal workers) or the Virginia Workmen's Compensation Act (private shipyard workers).

The first 40 cases came to Gene Locks, a Philadelphia attorney, as a result of a talk he was invited to make in 1976 at the Portsmouth Naval Shipyard, detailing his research into asbestos disease and manufacturer liability in Pennsylvania. Mr. Locks engaged a young lawyer named Richard Glasser to serve as local counsel in those cases. Mr. Glasser had no previous experience in asbestos cases, and very little previous experience in tort claims. Subsequent events led other local claimants to engage the services of Locks and Glasser. Some such claimants came from the Newport News private shipyard. In those cases, a young lawyer named Robert Hatten was local counsel. Glasser and Hatten worked together on pleadings, discovery and trial preparation, under Locks' supervision and direction, with Locks participating personally as lead counsel at nearly every level, but especially (i) in the so-called "national discovery" of each side's major witnesses on the liability and medical issues, (ii) in conducting those several cases tried, and (iii) in all serious settlement negotiations through 1980.

Mr. Locks is one of two partners in a Philadelphia firm that had only six lawyers (two partners and four associates) in 1980, but had more than 1200 asbestos claims, and was being offered others it could not find time to handle. During 1979 and 1980, Locks had become well acquainted with Neil Peterson, a senior Justice Department trial lawyer who was defending the interests of the Navy Department in approximately 233 third party actions filed by the defendant asbestos manufacturers in cases arising in the Norfolk Naval Shipyard or from repair or construction of Naval vessels in the Newport News private shipyard. It was always reasonably clear, and is now judicially well established, that the United States has no liability or financial exposure in any of those cases. It has yet to pay a dime. Defendants keep insisting they have some viable theory of liability but have con-

sistently lost all arguments, and have finally voluntarily dismissed all the Norfolk third party actions and some of the others. Under court direction to file all possible claims by a February 1979 deadline, approximately 19 direct actions against the United States were filed in Newport News by asbestos workers for protective purposes. These were officially stayed within 90 days (by agreement) and remained utterly dormant until dismissed earlier in 1982. In no active cases did Peterson and his associates make common cause or participate in discovery with counsel for defendants. This followed because the United States participated, by law, in most recoveries against the manufacturers, recovering amounts, pursuant to 5 U.S.C. 8132, it had paid to the plaintiffs, and would pay, under F.E.C.A. Moreover, proving the direct and primary negligence of the manufacturers would completely exonerate the United States as a matter of law from the third party claims for indemnity filed against it by the manufacturers.

Beleaguered with a huge caseload in July, 1980, Gene Locks learned that Neil Peterson was considering entry into private practice. Recognizing that Peterson, as a seasoned trial lawyer knowledgeable about asbestos, could step immediately into several hundred pending cases against private manufacturers in cases outside Virginia where the United States was in no way involved, Locks offered to employ him. Peterson immediately notified and consulted the appropriate officials at the Justice Department to chart a proper and ethical course of action to avoid for himself any improper conduct, and to protect his future employers from imputed disqualification. This is well documented in the record, and resulted in a "screen" which was, and still is, faithfully observed, to the full and current satisfaction of the Justice Department. After inexplicable bureaucratic delays, these arrangements ultimately resulted in the issuance of a formal waiver of imputed disqualification for Greitzer and Locks, filed in January, 1981, in the Virginia disqualification proceedings

brought by the manufacturers in November 1980.

The one and only "lapse" chargeable to Neil Peterson or Greitzer and Locks is the unintended discourtesy to the United States District Court in failing (i) to give the judges notice of Peterson's withdrawal from representing the United States, and (ii) to explain his employment to serve Greitzer and Locks ELSEWHERE, and the screening arrangements. In its opinion which ordered imputed disqualification after all the facts were in evidence, the District Court's opinion stated, with ill-disguised pique, that it would have reached the same result even if it had been informed in advance.

II. JOHNS-MANVILLE STRATEGY

At every stage, and in every way, utilizing all the devices and opportunities known to lawyers, Johns-Manville has delayed and dragged out these cases. Never has it opposed any continuance. Never has it opposed any formal or informal stay. Never has it sought to expedite any trial or hearing; to the contrary, it has welcomed every delay and agreed to any request for same, and come forth with many "sound reasons" therefor.

When United States District Court Judge Calvitt Clarke set aside four verdicts as "excessive" in the Oman, Walker asbestos cases and ruled erroneously on the statute of limitations and other issues, Johns-Manville was delighted for the opportunity to see all future trials held in abeyance 15 months or more while the Fourth Circuit reversed and Johns-Manville petitioned for Certiorari (denied) to the United States Supreme Court. The Disqualification Motion came as a godsend, offering another year or two of delay. It was filed without one single word of prior conversation or correspondence with Peterson, Greitzer and Locks, local counsel or the Justice Department!

III. MERITS OF THE DISQUALIFICATION MOTION

The order of disqualification entered by the trial court was REVERSED, in a 2-1 decision, by the Fourth Circuit Court of Appeals. The majority opinion, written by a judge with major experience in asbestos claims, is a model of clarity and soundness. (See Appendix "A") It is attached hereto as a succinct and compelling statement of the law and facts, to be contrasted with the somewhat emotional dissent which dwells upon, and indeed magnifies, erroneous and unfounded inferences in the District Court opinion. To his credit, the dissenting judge candidly acknowledges (i) his inclination to attach a high degree of presumptive infallibility to the findings of his brethren below, and (ii) his amazing failure to discuss the relevant A.B.A. Canons (and the leading cases construing them). To the astonishment of all, the Court of Appeals granted an en banc hearing, and found itself evenly divided, 5 to 5, thereby technically affirming the District Court, and giving yet another reprieve to the manufacturers, but for the decision of the United States District Court to proceed with trials in view of the declining health and death of many of the plaintiffs, after four or five years of delay.

As a footnote, the Oman, Walker cases (4) have now been retried in the District Court on more favorable law and rulings and with more evidence of progression of the diseases, but without the expertise of Gene Locks, who had obtained verdicts totalling $1,720,000.00. The verdicts obtained by local counsel at re-trial amounted to $829,000.00, or less than half the amount Locks obtained with less favorable evidence.

IV. THE "BANKRUPTCY PLOY"

Johns-Manville is undoubtedly the most solvent manufacturer in history to seek relief from accountability for its misdeeds by

invoking the Bankruptcy Act. Its efforts to insulate its assets from long-suffering asbestos plaintiffs is one of the sorriest chapters in American industrial history. However, regardless of its success or failure in obtaining substantive relief, Johns-Manville, by the time it exhausts all appeals, will have bought a further delay of at least two years in holding these plaintiffs at bay, a fact which has financial value worth tens or hundreds of millions of dollars to Johns-Manville, and conversely, will fatally abort the rights of many dying victims and have a devastating effect on their rights and those of their dependents.

B. RELIEF SOUGHT

I. DENY RESPONDENTS' MOTION

The Restraining Order entered by the United States Bankruptcy Court for the Southern District of New York (attached to Respondents' motion) does not apply to these proceedings. The order traces the language of 11 U.S.C. §362(a)(1) of the Bankruptcy Code, which enjoins a party from

> Commencing or continuing, including the issuance or employment of process, and judicial, administrative or other proceeding against Manville, that was or could have been commenced before the commencement of Manville's Chapter 11 cases . . . (emphasis added).

Contrary to Respondents' suggestion in Paragraph two of their motion that the filing of the Chapter 11 Petition "automatically" stays "all" proceedings involving Johns-Manville . . ., directly or indirectly," the statute and the order clearly contemplate a more limited application; otherwise, there would be no need to enumerate the particular proceedings covered by the stay. The use of the word "against" in the Bankruptcy Court's order, rather than "involving"

limits the scope of the §362(a)(1) stay in paragraph one to actions commenced against Manville. The Motion to Disqualify Counsel, which is the subject of these proceedings, was initiated and prosecuted by Manville and the other manufacturers against Petitioners. Petitioners are not continuing an action "against" Respondents, but are merely exercising their statutory right to appeal an adverse final decision in a wholly collateral matter which was brought "by" Manville and others.

Deferring these proceedings pending the outcome of the Manville reorganization would constitute a gross misapplication of the 11 U.S.C. §362 stay. The purpose of the automatic stay provision in proceedings against a debtor is to give the insolvent debtor an opportunity to take stock and formulate plans for repayment and reorganization with protection from "a chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts." In re Frigitemp Corp., 8 B.R. 284 (D.C.N.Y. 1981). These proceedings, which are collateral to the underlying litigation, as set forth in detail in our Petition for Certiorari, have nothing to do with adjudicating Manville's liability and will have no effect on the corporations' assets. A final determination will merely resolve the question of whether Gene Locks may represent some 260 asbestos plaintiffs in trials which are proceeding against a number of asbestos manufacturers other than Manville in the Eastern District of Virginia on a monthly schedule.

The stay mechanism was not designed to allow major corporations to invoke its protection solely for tactical and delay purposes in a proceeding initiated in part by those corporations. This Court should be particularly suspect of the Manville corporations' motivation for filing this motion, since they have taken the opposite

positions when their purpose was served. For example, they have specifically requested that the Bankruptcy Court lift an automatic stay in bankruptcy to file appeals in three (3) cases and are currently involved in asbestos related litigation against their insurance carrier in California, undeterred and unaffected by the stay in their bankruptcy proceeding.

It is not Petitioner's position that Manville's participation in those matters is improper. In fact, "nothing in the Bankruptcy Act stays or prevents the petitioner before the Bankruptcy Court from filing claims against other parties." Engine Rebuilders v. Seven Seas Import-Export, 615 P. 2d 871, 874 (Mont. 1980). It is, however, more than noteworthy that Manville is not the typical bankrupt with no assets; it is a major, viable corporation with the financial resources to manipulate the protective devices of the Bankruptcy Act when its purpose is served.

II. SEVER JOHNS-MANVILLE

The Johns-Manville corporations should be severed from this action if this Court feels that the Bankruptcy law has any application to these proceedings. This matter has been pending since the manufacturers filed their motion in November of 1980. Petitioners submit that the four remaining defendants who have been involved for nearly two years are perfectly capable of dealing with the issues, which have been fully briefed in the District and Appeals Courts. In addition, counsel for two of the four remaining manufacturers, H. K. Porter Company, Inc., and Southern Tile Corporation, participated in the most recent oral argument before the Fourth Circuit Court of Appeals.

The District Court for the Eastern District of Virginia (wherein nearly 260 asbestos plaintiffs await trial without the benefit of counsel of choice as a result of these proceedings) has refused

to stay such actions, and, "to avoid delay, prejudice and inconvenience," (See Exhibit "B") has allowed the cases to proceed to trial by severing Unarco Industries, Inc. and Manville, who have invoked Chapter 11 protection. It would not only be inconsistent, but ludicrous to sever Manville from ongoing trials and deny the asbestos plaintiffs and counsel their statutory right to pursue an appeal of an action instituted by Manville and its co-defendants. It is also instructive that a majority of the manufacturers whom the plaintiffs now face in the District Court did not join Manville in the Petition for Rehearing of these proceedings in the Court of Appeals.

These proceedings do not involve a demand for monetary damages; they do not affect the issue of Manville's liability. If the manufacturers' position on the merits on appeal is sound, an adjudication to that effect can only benefit respondents unless their entire purpose is the obstruction of justice by preventing resolution of this matter. If their position is unsound and the courts below should be reversed, it would be an obstruction of justice to refuse to sever Manville from the other manufacturers.

WHEREFORE, Petitioners respectfully request that the Motion of Respondents, John-Manville Corporation and Johns-Manville Sales Corporation be denied, and that in the alternative, said Respondents be severed from these proceedings.

GREITZER & LOCKS, GENE LOCKS, MARTIN GREITZER and NEIL R. PETERSON

By: Linda Laibstain
Of Counsel

Robert C. Nusbaum
Linda S. Laibstain
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CERTIFICATE

This is to certify that pursuant to Rule 28.5(b), Rules of the United States Supreme Court, I have mailed a true copy of the foregoing pleading by depositing same in a United States post office mailbox, first class, postage pre-paid, or hand delivering same to the following, this _____ day of October, 1982:

C. Michael Montgomery, Seawell, Dalton, Hughes & Timms, Post Office Box 119, Norfolk, Virginia 23501, Counsel for Johns-Manville Corporation and Johns-Manville Sales Corporation; William V. Hoyle, Esquire, Hoyle, Corbett, Hubbard, Smith & Payne, 11048 Warwick Boulevard, Suite 201, Newport News, Virginia 23601, Counsel for Raybestos-Manhatten, Inc.; William B. Eley, Esquire, Willcox, Savage, Dickson, Hollis & Eley. P.C., Post Office Box 3686, Norfolk, Virginia 23514, Counsel for Eagle-Picher Industries, Inc.; Gerard E. W. Voyer, Esquire, Taylor, Walker & Adams, Post Office Box 3530, Norfolk, Virginia 23514, Counsel for Unarco Industries, Inc.; Stuart Bateman, Esquire, 11048 Warwick Boulevard, Newport News, Virginia 23601, Counsel for Fibreboard Corporation; Archibald Wallace, III, Esquire, Sands, Anderson, Marks & Miller, Post Office Box 1998, Richmond, Virginia 23216, Counsel for H. K. Porter Company; John Y. Pearson, Jr., Esquire, Willcox, Savage, Dickson, Hollis & Eley, P.C., 1800 Virginia National Bank Building, Norfolk, Virginia 23510, Counsel for The Celotex Corporation; Henry C. Morgan, Jr., Esquire, Pender & Coward, Post Office Box 12027, Norfolk, Virginia 23502, Counsel for Keene Corporation; Richard S. Glasser, Esquire, Glasser and Glasser, 504 Plaza One Building, Norfolk, Virginia 23510, Counsel for Amicus below; Robert R. Hatten, Esquire, Patten & Wornom, 14749 Warwick Boulevard, Newport News, Virginia 23602, Counsel for Amicus below; Solicitor General, Department of Justice, Washington, D.C. 20530, Counsel for United States of America, Amicus below.

Linda S. Laibstain

LIAISON NOTICE

AUG 30 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK AND NEWPORT NEWS DIVISIONS

By _____ Deputy Clerk

IN RE: ASBESTOS CASES — C/P 77-1

NANCY COOK ROBERTSON, EXECUTRIX OF THE ESTATE OF JAMES H. ROBERTSON, DECEASED, and JOHN C. LUMPKIN, ADMINISTRATOR OF THE ESTATE OF GEORGE HENRY RIDDICK, DECEASED,

Plaintiffs,

vs.

JOHNS-MANVILLE CORP., et al

Defendants.

Civil Action No. 77-601-N

Civil Action No. 79-215-N

LIAISON NOTICE
No # 900
Date Rec'd 9/3/82
Date Mailed 9/3/82

THOMAS HOGGE, DONAHUE ELLIS, WILSON JONES, and JESSE JAMES,

Plaintiffs,

vs.

JOHNS-MANVILLE CORP., et al

Defendants.

Civil Action No. 82-23-NN
(Formerly Civil Action Nos. 76-178-NN and 79-59-N

JESSIE WELLS and JAMES VESS,

Plaintiffs,

vs.

JOHNS-MANVILLE CORP., et al

Defendants.

Civil Action Nos. 80-691-N and 80-693-N

ORDER

THIS DAY appeared the Plaintiffs, by counsel, and pursua to Rule 21 of the Federal Rules of Civil Procedure, moved to sever their respective claims against Johns-Manville Corp. and Johns-Manville Sales Corp.

It appearing to the Court that Johns-Manville Corp. and Johns-Manville Sales Corp. have filed a voluntary petition for reorganization under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York in New York, New York, and that the above-styled cases should continue to proceed in this Court against the other Defendants in order to avoid delay, prejudice and inconvenience, it is hereby ORDERED for good cause shown that th Plaintiffs' claims against Johns-Manville Corp. and Johns-Manvil Sales Corp. in the above-styled matters be and hereby are severed pursuant to Rule 21 of the Federal Rules of Civil Procedure, and that the Plaintiffs' claims against the other Defendants herein shall continue to proceed, separately, in thi Court. ~~It is further ORDERED that this Order be entered nun pro tunc as of August 25, 1982.~~

ENTERED this 30 day of August, 1982.

United States District Judge

I ASK FOR THIS:

Of Counsel for Plaintiffs

HAVE SEEN: ~~objected to~~:

Of Counsel for Eagle-Picher Industries, Inc.

Of Counsel for H. K. Porter Co. and Southern Textile Corporation

Of Counsel for Pittsburgh Corning Corporation

Of Counsel for Raybestos-Manhattan, Inc.

Of Counsel for The Celotex Corporation

"Exhibit "A"

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 81-1379

Greitzer & Locks, Gene Locks and Martin Greitzer; Neil R. Peterson,

Appellants,

v.

Johns-Manville Corporation and Johns-Manville Sales Corporation; Raybestos-Manhatten, Inc; Eagle-Picher Industries, Inc.; Unarco Industries, Inc.; Fibreboard Corporation; H. K. Porter Company; Southern Textile Corporation; Pittsburgh Corning Corporation; The Celotex Corporation; Keene Corporation,

Appellees,

United States of America,

Amicus Curiae.

Appeal from the United States District Court for the Eastern District of Virginia at Norfolk and Newport News. J. Calvitt Clarke, Jr., District Judge.

Argued: October 5, 1981 Decided: March 5, 1982

Before WIDENER, MURNAGHAN and CHAPMAN, Circuit Judges

Robert C. Nusbaum (Hofheimer, Nusbaum, McPhaul & Brenner on brief) for Appellants; C. Michael Montgomery (C. Grigsby Scifres, Seawell, Dalton, Hughes & Timms; William V. Hoyle, Charles A. Smith, Philip S. Payne, Hoyle, Corbett, Hubbard, Smith & Payne; William B. Eley, Eley, Rutherford & Leafe; Gerard E. W. Voyer, Taylor, Walker & Adams; Stuart Bateman; Archibald Wallace, III, Albert D. Bugg, Jr., Sands, Anderson, Marks & Miller; Worth Banner, Reynolds, Smith & Winters; John Spindle; Henry C. Morgan, Jr., Pender, Coward, Addison & Morgan on brief) for Appellees; (Richard S. Glasser, Glasser and Glasser; Robert R. Hatten, Patten and Wornom on brief) as Amicus Curiae for Virginia Asbestos Plaintiffs (Stuart E. Schiffer, Acting Assistant Attorney General, Justin W. Williams, United States Attorney, Robert E. Kopp, John F. Cordes, Civil Division, Department of Justice on brief) as Amicus Curiae for United States.

CHAPMAN, Circuit Judge:

This appeal is from orders disqualifying the law firm of Greitzer & Locks from participation in approximately 77 Virginia asbestosis cases in which it serves as counsel. The three judges of the Norfolk and Newport News Divisions of the Eastern District of Virginia, sitting en banc, disqualified the law firm from participation in all asbestosis cases filed in Virginia because the firm employed Neil R. Peterson, who until his employment with Greitzer & Locks had been the Justice Department litigator charged with defending the United States in the Virginia asbestosis cases.

Greitzer & Locks is a six person firm located in Philadelphia, Pennsylvania. Peterson joined the firm in October of 1980 as the sixth attorney and fourth associate at the firm. In addition to the Virginia asbestosis litigation, the firm participates in approximately 1200 other asbestosis cases nationwide. Appellees (hereafter "manufacturers") manufacture and distribute products containing asbestos.

On April 23, 1981 the so-called Norfolk asbestosis litigation involved 333 individual plaintiffs. This litigation comprised essentially all of the asbestosis litigation pending in Virginia. The United States was a party to claims of 246 of the individual plaintiffs' claims. These 246 individual claims comprised 77 separate civil actions. Greitzer & Locks served as co-counsel, representing 223 plaintiffs in 67 of these

civil actions. Greitzer & Locks represented a total of 260 plaintiffs in the Norfolk litigation, whose claims comprised 77 separate civil actions.

Since this circuit follows the rule permitting appeal of orders granting motions to disqualify counsel pursuant to the "collateral order" exception to the finality requirement of 28 U.S.C. §1291, Aetna Casualty & Surety Co. v. United States, 570 F.2d 1197, 1200 (4th Cir. 1978), cert. den. 439 U.S. 821 (1978), jurisdiction of this appeal is pursuant to §1291. The question of appealability of orders disqualifying counsel was expressly reserved in the Supreme Court's recent ruling in Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981). Since this opinion expressly reserved the question of appealability of orders disqualifying counsel, Aetna Casualty & Surety Co., supra, is still binding authority in this circuit.

There is no question that Peterson is disqualified from participation in the Virginia asbestosis cases. The fact of his personal disqualification was recognized in advance of the motion for disqualification by Peterson, the government and Greitzer & Locks, who all agreed that Peterson was to be screened from participation in the Virginia cases. This appeal concerns whether Greitzer & Locks should be disqualified from continued participation in the Virginia asbestosis cases despite the firm's efforts to screen Peterson from participation in any asbestosis cases in which the United States is a direct defendant and from all asbestosis cases in Virginia.

Our scope of review in this matter is not limited to abuse of discretion as appellees contend. In disqualification cases where the facts are not in dispute, as they are not here, it is appropriate for the appellate court "to determine whether the District Court's disqualification order was predicated upon a proper understanding of the applicable ethical principles." Woods v. Covington Cty. Bank, 537 F.2d 804, 810 (5th Cir. 1978); Aetna Casualty & Surety Co., supra at 1200. It is our opinion that the district court erred in concluding that the screen approved by the government would not be sufficient to protect the government from inadvertent disclosure of confidences and trial secrets Peterson may have learned while with the government.

In 1977 Peterson was employed as special litigation counsel in the Civil Division of the Department of Justice, where his duties were "to be generally involved with the coordination of the defense of asbestos litigation against the United States, and to personally undertake the defense of one major group of asbestos cases, the . . . Norfolk cases." Peterson's principal duty from September 1977 until October 1980 was to act as counsel for the United States Navy in the Norfolk litigation. During this same period, Peterson provided strategy for the defense of the United States in asbestosis litigation generally.

In January of 1980, Peterson began looking for a position with a private firm. Sometime in July of 1980, Gene Locks of Greitzer & Locks heard that Peterson was looking for private employment and contacted Peterson about employment with Greitzer & Locks. In August of 1980, Peterson consulted the Office of Legal Counsel of the Justice Department about his employment with Greitzer & Locks. There he was advised that the Ethics in Government Act prohibited his participation in the Norfolk cases. He was also advised that if he went with Greitzer & Locks, he would have to be screened from the firm's participation in these cases. Greitzer & Locks agreed to these limitations.

On September 10, 1980, Peterson formally advised the Civil Division of the Justice Department that he planned to participate in asbestosis litigation upon his association with Greitzer & Locks. Peterson noted his "understanding" with Greitzer & Locks that he would not participate in the Norfolk cases and certain other cases in which he participated while in government. Peterson provided the Department with proposed "shielding" provisions and asked it to indicate that it "would have no objection to the firm of Greitzer & Locks continuing to participate in current litigation, particularly that in Norfolk and Newport News, Virginia . . . provided the firm complies with . . . 'shielding' provisions . . . ." The specified shielding provisions prohibited Peterson from working, advising,

or participating, indirectly, by discovery, analysis or otherwise, in the Virginia cases. He was to be denied access to the files and prohibited from sharing in profits derived from the Virginia cases.

The Civil Division was not able to finalize a recommendation for Peterson by the end of September. Peterson was therefore asked to submit a memorandum projecting his first month's duties with Greitzer & Locks. Peterson submitted this memorandum on September 30, 1980, and he left the Department of Justice effective October 3, 1980.

The Civil Division solicited its client agencies' views on Peterson's waiver request. The Department of Health and Human Services and the Department of Labor expressed reservations about Peterson working for Greitzer & Locks, specifically noting Peterson's access to government asbestosis files and knowledge of government litigation strategy. The Navy, the client agency in the Virginia litigation, did not object to waiver of Greitzer & Locks' participation in these cases, but it did reserve its objection to the firm's participation in other cases. The Office of Legal Counsel noted that Peterson should be screened from all cases involving his client agencies, not just those in Virginia.

The Justice Department had not acted on the proposed screening arrangement by November 26, 1980, the date the manufacturer filed their motion to disqualify Greitzer & Locks from participation

in the Virginia cases. Counsel for Peterson met with the Justice Department in early January. In response to concern about Peterson's participation in any asbestosis actions against the United States, Peterson submitted a revised proposal in which he was to be screened from all asbestosis actions in which the United States was a direct defendant. In addition, in those cases in which the United States was or might become a third-party defendant, Peterson's participation was to be confined to those aspects of the plaintiffs' cases against the direct defendants. Peterson was also to be barred from taking discovery from the United States or from deposing or cross-examining any government witness. The Justice Department, on January 8, 1981, wrote Peterson, informing him that the Civil Division and all client agencies had waived "imputed disqualification" of Greitzer & Locks from the Virginia asbestosis litigation, provided Peterson and Greitzer & Locks abided by the screening arrangements.

The merits of the appeal focus on two disciplinary rules in the ABA Code of Professional Responsibility. The first is D.R. 9-101(B), which reads as follows, "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee." The second disciplinary rule is D.R. 5-105(D), which reads as follows,

"If a lawyer is required to decline employment or to withdraw from employment under a disciplinary rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."

A literal interpretation of D.R. 5-105(D) would require widespread disqualification of firms employing former government attorneys. The American Bar Association, however, does not interpret D.R. 5-105(D) to mandate law firm disqualification whenever employment of a government attorney results in a firm conflict of interest. In Formal Opinion 342 the ABA Ethics Committee takes the position that disqualification of the firm may not be necessary if the disqualified lawyer has been properly screened from participation in the case and there is "no appearance of significant impropriety affecting the interests of the government." 62 A.B.A.J. 517, 521 (1976).

Other appellate courts have followed the ABA's lead and rejected a literal interpretation of D.R. 5-105(D) when the disqualified government attorney is properly screened. Woods v. Covington Cty. Bank, supra at 812-13; Armstrong v. McAlpin, 625 F.2d 433, 445 (2nd Cir. 1980) (en banc), vacated on other grounds, 449 U.S. 1106 (1981). This court has expressed dissatisfaction with automatic, mechanical applications of the Code of Professional Responsibility. Aetna Casualty & Surety Co. v. United States, supra at 1202. We now rule that, when appropriate, the intrafirm screen is an acceptable alternative to automatic disqualification of a law firm hiring a former government attorney.

The plaintiffs and the Justice Department (on brief as amicus curiae) argue that the district court erred in rejecting the screening arrangement between Peterson and the other attorneys in Greitzer & Locks since the screen had been approved by the government. In Formal Opinion 342 the ABA Ethics Committee takes the position that the government may waive disqualification of the firm "whenever the government agency is satisfied that the screening measures will effectively isolate the individual lawyer from participating in the particular matter and sharing in the fees attributable to it, and that there is no appearance of significant impropriety affecting the interests of the government . . . ."[1] 62 A.B.A.J., supra. We are satisfied that the affected client agencies of the government are often the best judges of the suitability of screens erected to protect them from disclosure of confidences and secrets. For this reason, the government's waiver of imputed disqualification of a law firm is entitled to substantial deference. Formal Opinion 342, supra; ABA Proposed Final Draft of the Model Rules of Professional Conduct, Rule 11.1 (May 31, 1981).

Notwithstanding the deference to be afforded a governmental waiver of imputed disqualification, the courts have an independent

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[1] Formal Opinion 342 also provides that governmental waiver of imputed disqualification does not relieve the affected law firm from undertaking its own independent evaluation of the screening arrangement.

participation of an otherwise disqualified law firm. See Kesselhaut v. United States, 555 F.2d 791 (Ct.Cl. 1977) (en banc) (per curiam); Accord, Hull v. Celanese Corporation, 513 F.2d 568 (2nd Cir. 1975); Ethical Problems for the Law Firm of a Former Government Attorney: Firm or Individual Disqualification, 1977 Duke L.J. 512, 520-21, 528.

The district court concluded that the intrafirm screen approved by the government would not effectively shield the government from accidental disclosure of confidences and trial strategy known by Peterson. The court noted that Peterson would be participating in the trial or settlement of approximately one thousand asbestosis cases. It reasoned that these cases would take a considerable amount of time to litigate and that the small size of Greitzer & Locks and the prolonged nature of asbestosis litigation would make inadvertent disclosures inevitable. In disqualifying Greitzer & Locks the court also relied on the possibility that Peterson had already passed confidential information to other members of the law firm. This possibility of past disclosure was based on the fact that during October, November and December of 1980 Greitzer & Locks operated under the assumption that Peterson was only to be barred from participation in the Virginia cases. The court reasoned that there was a real possibility Peterson had inadvertently disclosed confidential information while free to work on non-Virginia asbestosis cases involving the United States. Finally, the court concluded that

Greitzer & Locks' unique caseload made it impossible to screen Peterson from participation in profits from all cases in which the United States was a direct defendant.

The district court was correctly concerned that the small size of Greitzer & Locks, when considered in terms of the firm's caseload (1200 asbestosis cases nationwide), would work against effectiveness of the screen. The court was also correct to be concerned about the possibility of inadvertent disclosure from the time Peterson went to work for Greitzer & Locks until the time the government approved the screen precluding Peterson's participation in any cases against the United States.[2] See note, the Chinese Wall Defense to Law-Firm Disqualification, 128 U.Pa.L.Rev. 650, 712-13 (1980).

Doubts about the size of a firm and timely implementation of the screen may sometimes be sufficient to reject a screening arrangement. Cheng v. GAF Corporation, 631 F.2d 1052,1058 (2nd Cir. 1980), vacated on other grounds, 101 S.Ct. 1338 (1981).

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[2] While we agree that it is necessary to screen Peterson from financial participation in the Virginia cases and other cases in which the United States is a direct defendant, we do not agree with the district court that it is impossible for Greitzer & Locks to screen Peterson from direct financial participation in these cases. The indirect benefits that might accrue to Peterson do not make the screen unacceptable when Greitzer & Locks makes every effort to screen him from direct financial participation in these cases.

On the other hand, when the government has waived imputed disqualification of a firm, there is a strong probability that there has been a knowing waiver of disqualification and that the government is willing to bear the risk of inadvertent disclosures. We believe, therefore, once imputed disqualification has been waived, a possibility of inadvertent disclosure based on the size of a firm and its relative caseload is not a sufficient reason for rejecting a screening arrangement such as that in this case.

As noted in Aetna Casualty & Surety Co. v. United States, supra, we are concerned with "how real in the practical world [asserted ethical problems] are in fact." In this case the district court merely speculated that opportunities for inadvertent disclosures would arise without analyzing the specific situation in which the disclosures were to take place.[3]

Peterson will be participating in the non-Virginia asbestosis actions against the manufacturers with other attorneys at Greitzer & Locks. Other attorneys will be participating in asbestosis actions directly against the United States. Both the direct actions against the manufacturers (on which Peterson and other attorneys at Greitzer & Locks will be working) and the direct actions against the United States (on which Peterson's co-attorneys will be working)

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[3] While we rule that the district court's finding of a possibility of inadvertent disclosure is too speculative, this opinion is not a ruling on the minimum showing that will be sufficient to overcome a governmental waiver of imputed disqualification.

appear to be proceeding on the same theories of liability -- negligent failure to warn, implied warranty, and strict tort. If the manufacturer's liability is so intimately related to actions by the government, that Peterson and the other attorneys at Greitzer & Locks cannot work together on the actions against the manufacturers without Peterson disclosing confidences that would taint the Virginia plaintiffs' direct claims against the government, then disqualification of Greitzer & Locks from the Virginia plaintiffs' direct actions against the United States would be justified.

We are unsure, after considering the present record and the district court's conclusions based on a comparison of the size of Greitzer & Locks and its caseload, whether such a danger in fact exists. One circumstance making such a ruling less likely is the fact that Peterson will only be participating in non-Virginia asbestosis actions, which will of necessity arise in a different location than the Virginia actions, and thus be less factually similar to the actions in Virginia.[4] The less similar the actions, the more likely it is that Peterson and the other attorneys at Greitzer & Locks can work together on the non-Virginia actions without risking disclosure.

Based on the foregoing, we believe that the district court failed to show that the continued participation of Greitzer & Locks in the actions directly against the United States presents a

[4] Most Norfolk and Newport News asbestosis cases involving the United States as a named defendant or a third party defendant originate in the construction or repair of Navy ships, which will not be true in many parts of the country where the firm represents asbestosis plaintiffs.

sufficient taint to the underlying trial of those cases so as to reject the government's waiver of imputed disqualification. Accordingly, we vacate the order of the district court disqualifying Greitzer & Locks from these claims.

The district court also disqualified Greitzer & Locks from further participation in the Virginia asbestosis actions directly against the manufacturers. We find that the facts in this case do not justify imposition of this harsh remedy and reverse the district court's action with respect to these cases.

The United States is joined as a third-party defendant in some of the plaintiffs' actions against the manufacturers. When he was employed by the government, Peterson was in an adversarial position to the manufacturers in these cases. Peterson did not participate in the direct defendants' strategy sessions; he did not attend settlement conferences;[5] nor did he undertake joint discovery with the manufacturers.[6] Now that Peterson is with Greitzer & Locks, he continues to be in an adversarial position to the manufacturers, but he is screened from participation in any of the Virginia cases against them.

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[5] In connection with the appeal in Glover v. Johns-Manville Corporation, 662 F.2d 225 (4th Cir. 1981), Peterson was permitted to glance at the breakdown of the manufacturer's contributions to the settlement of the direct action in that case. As noted in the appellate opinion, each contribution was less than $10,000. Id. at

[6] When Peterson was with the government, counsel for plaintiffs and the manufacturers separately interviewed certain government witness Peterson was privy to notes taken during these interviews by counse for both sides.

The district court accepted the manufacturers' contentions that the screen approved by the government would not adequately protect the manufacturers from the possibility of inadvertent disclosure of confidential information. While the district court was unquestionably obligated to carefully scrutinize any evidence of actual prejudice to the manufacturers, one important circumstance distinguishes our analysis of the manufacturers' position from that of the government. Since Peterson and the government were in an attorney-client relationship, the government was entitled to a presumption that Peterson learned confidences and secrets while employed there. E. g., In re Yarn Processing Patent Validity Litigation, 530 F.2d 83, 89 (5th Cir. 1976); Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2nd Cir. 1973). Since there is no attorney-client relationship between Peterson and the manufacturers, they are not entitled to a presumption that Peterson acquired confidential information about them while he was with the government. Fred Weber, Inc. v. Shell Oil Company, 566 F.2d 602, 608 (8th Cir. 1977), cert. den. 436 U.S. 905 (1978).

In the absence of such a presumption and in the face of a governmental waiver of imputed disqualification, we believe that the district court should have had evidence of actual prejudice to the manufacturers before rejecting the screen. We find no such evidence in this record.

The manufacturers direct attention to the fact that Peterson had access to proprietary information about them that had been disclosed to the Navy Bureau of Medicine & Surgery. They also point out that Peterson was privy to notes defense counsel had taken during interviews of government witnesses (see note 5 supra) and that Peterson glanced at a breakdown of the manufacturers' contributions to the Glover settlement (see note 4 supra).

Any specific recollection that Peterson may have of the breakdown in the Glover settlement is not likely to be inadvertentl disclosed. Furthermore, the breakdown in the manufacturers' contributions to the settlement of each case varies according to the relative exposure of each individual plaintiff to each manufacturer's products. Thus, it is unlikely that Peterson gained any material insight by glancing at the settlement breakdow

The manufacturers were also unable to demonstrate that the interview notes or proprietary information contained confidences that would materially prejudice their defense of the Virginia cases. In the absence of such evidence and given the fact that Peterson has been screened from the Virginia cases, we believe that the manufacturers have not demonstrated that Greitzer & Locks should be disqualified from the Virginia asbestosis actions because of Peterson's access to confidential information.

The district court also ruled that Greitzer & Locks should be disqualified from all Virginia asbestosis actions because Peterson's switching sides in the midst of the asbestosis litigati

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[7] Asbestosis litigation is of recent origin and has had explosive growth in the past five years. The number of potential cases can not be determined. To bar Peterson from practicing as a private lawyer in this growing field of law would be unfair, particularly view of the screen protecting his former employer and client.

created an impermissible appearance of impropriety. Intrafirm screens are destined to an uneasy relationship with the mandate of Canon 9 to avoid even the appearance of impropriety. As one commentator has suggested,

> Although broad in scope, that requirement's main thrust is to obligate a lawyer to "promote public confidence" in the American legal system "and in the legal profession." No matter how effective, Chinese walls are not likely to foster public confidence because the details of a law firm's efforts to avoid disqualification will doubtless make but a small impression upon public awareness. (footnotes omitted).

The Chinese Wall Defense, supra at 685. Other appellate courts have recently refused to reject an intrafirm screen solely on the basis of appearance of impropriety. Cf. Woods v. Covington Cty. Bank, supra, (must be "at least a reasonable possibility that some specifically identifiable impropriety did in fact occur") and Armstrong v. McAlpin, supra at 445 ("appearance of impropriety is . . . too slender a reed on which to rest a disqualification order"). We also decline to reject the instant screen solely on the basis of appearance of impropriety.

Accordingly, the order of the district court disqualifying Greitzer & Locks from the Virginia asbestosis actions against the manufacturers is reversed; the order of the district court disqualifying Greitzer & Locks from the asbestosis actions directly against the United States is vacated.

REVERSED IN PART;

VACATED IN PART.

MURNAGHAN, Circuit Judge, dissenting:

I dissent.

As is customary in cases on appeal, we do not approach the problem afresh. We have already the determination not simply of one but of three experienced district judges that fairness will not be served in the conduct of litigation in the United States District Court for the Eastern District of Virginia if the firm of Greitzer & Locks, the employer of Peterson, is permitted to continue to represent a large number of plaintiffs in asbestosis litigation.

Had the case come to us simply in the posture of a timely imposed screen insulating Peterson in advance from contacts productive of conflicts of interest, actual or apparent, I should be more inclined to accept the view of the majority. Even then, however, the reasoned judgment of three district judges would command my respect, and I would not lightly interfere with a decision so intimately concerned with the conduct of affairs in their court.

In any event, however, that is not the situation. Peterson had served for several years as the lawyer in charge of the defenses raised by the United States government, especially

the United States Navy, in asbestos claims arising in or near Norfolk and Newport News, Virginia. A law suit with multiple parties generally involves dividing up into sides. The United States and the manufacturers, as defendants, were on one side. The plaintiffs in many instances represented by Greitzer & Locks were on the other. While, in many respects, the defendants had non-coincidental positions and could be expected to jockey so as to shift liability away from themselves and toward the other defendants, nevertheless, they had an important common purpose, namely, to avoid liability altogether. In terms of appearances, not just to the public but to the bench and bar, it stretches belief unduly not to assume that there was compromise of Peterson as counsel for plaintiff in any asbestosis case arising in Virginia and of any employer which might hire him.

In view of that it was incumbent on Peterson as a prospective employee and especially incumbent upon Greitzer & Locks as a possible employer to take every precautionary step available to them before acting so as to put themselves in a fait accompli situation. Instead they rushed to act without formalizing a satisfactory screen arrangement, and then, having already entered an employment arrangement they sought to speak

in pitiable terms about the hardship to clients and to "poor" Peterson in terms of dislocations which would result from disqualification.

However, the situation was altogether one of Greitzer & Locks' own making. Even though a lawyer has practiced in a specialized area, he has no vested right to make one group of cases a lifetime project, especially where conflicts of interest are palpable and remain, unless and until resolved in advance, inescapable disqualifiers. Peterson must, along his professional path, have obtained trial experience and other lawyer-like attribute enabling him to perform in other areas than purely and solely asbestosis claims. He doubtless was capable of earning a living in other areas. It was obviously a sensitive matter for him to take employment from a firm representing plaintiffs in asbestosis cases in Virgina when he had been working in the same field as a defendant's lawyer for the government.

A self-imposed, unilaterally regulated "screen" leaving just to the employer, Greitzer & Locks, and the employee, Peterson, decisions as to the extent of isolation and degree of monitoring could not conceivably have sufficed. That should have been self-evident to Peterson.

Greitzer & Locks should have been at least as sensitive to the problem as Peterson. Peterson's employment with the government continued until Friday, October 3, 1980. Less than a month before, Peterson asked the Justice Department's consent to a screening arrangement which would permit him to take employment with Greitzer & Locks. There is no evidence of unreasonable delay on the part of the Justice Department in not having an answer to a complicated question involving several government agencies in the short span of twenty-odd days. Peterson essentially immediately after departure from government employment, on October 6, 1980, began providing his services to Greitzer & Locks without having worked out any agreement with his erstwhile employer, the government to satisfy justifiable anxieties and concerns which that immediately previous employer manifestly felt. The behavior of Greitzer & Locks in permitting employment to become effective in such circumstances was simply unprofessional and unacceptable.

Subsequently, a screening process imposing substantial increases in restrictions on Peterson and on Greitzer & Locks was worked out between Peterson and the government, although

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1 October 4, 1980 was a Saturday, and October 5, 1980 was a Sunday.

it was not accomplished until four months later on January 9, 1981.[2] A screening process is an understandable procedure for approaching the tangled and troubled question of potential conflicts on the part of lawyers. It must be recalled, however, that the customary situation arises with respect to one or at most a handful of cases. Most situations do not involve the magnitude of hundreds of separate pieces of litigation such as are here involved.

Furthermore, and most basically, a screening process

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2 In this connection, it is not irrelevant to observe that the waiver of disqualification did not proceed purely and simply from satisfaction on the government's part that it would not be disadvantaged by Peterson's employment by Greitzer & Locks. Rather, it was in large measure a matter of the lesser of two evils. In the case of two evils, one does not cease to be an evil just because it is accepted by the person faced with the choice, in order to avoid a greater evil. The government was concerned that, in the future, in other cases, involving other parties, it might encounter difficulty in obtaining desired employees who might be disinclined to work for the government if that meant that they would subsequently have to forego other employment. Yet the reasons for rules requiring such foregoing of attractive employment possibilities stemmed from other sources besides simply an employer such as the Department of Justice or the United States Navy. They have to do with the question which is core central here, namely, the insurance of fairness and unquestioned impartiality, without undue advantage, in the administration of justice. The manufacturer defendants, while naturally doubts arise as to their motivations in seeking disqualification of opposing lead counsel in a large number of cases, are, nevertheless, entitled to a judicial atmosphere uncontaminated by the ineradicable grounds for suspicion which Greitzer & Locks and Peterson have created by their behavior in the present case.

depends on the unquestioned integrity of those whose undertakings totally to disassociate themselves from certain aspects of specific litigation, or from conduct of affairs of their law firms in some areas, must be worthy of unquestioned belief.[3] Greitzer & Locks and Peterson did not come before the district court entitled to such implicit faith in their words. They tarnished their reputation for reliability and dependability by their actions in October 1980 when Peterson was hired by Greitzer & Locks in circumstances of "just trust me, you've nothing to worry about."[4] The district court acted in its discretion in losing faith. It, therefore,

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3 "It is the possibility of the breach of confidence, not the fact of the breach, that triggers disqualification." Trane v. Smith, 621 F.2d 994, 999 (9th Cir. 1980).

4 The district court noted:

> (2) Peterson accepted employment with the law firm and went to work with the firm before any agreement was worked out between the Government and the firm.
>
> (3) Peterson worked with the firm for three months before waiver agreement was worked out.

J.A. at 595.

> This hardship quite properly rests with the firm which knowingly undertook the employment of an individual in the face of the Code's clear prohibition, without first securing a Government waiver and seeking approval of the screening procedures from this Court.

J.A. at 598.

acted in its discretion in finding that a screen, the success of which depended on persons who were not dependable, was not sufficient to the purpose.

Appellants make much of the supposed regrettable imposition suffered by the clients in the hundreds of asbestosis cases here involved. Quite apart from the consideration that, whichever way our decision may turn, some clients are going to be injured, and independently of the fact that Greitzer & Locks brought it on themselves and on their clients, I venture the observation that the client loss through disassociation from Greitzer & Locks may not be as severe as pictured by that interested party.

In the first place, it is to me a matter of some concern that, as the record reveals, Greitzer & Locks established a uniform policy, presumably for the approximately 1500 cases in which it represents the plaintiffs, of demanding a contingent fee amounting to 40% of the gross recovery, as well as all costs incident to the services provided, unless there were an appeal, in which case the compensation would increase to 45%. The justification for such large percentages in contingent fee situations derives from the risk that the plaintiff may lose and that his or her counsel, therefore, may have expended substantial effort yet have gone

entirely uncompensated. The validity of that assumption is strong when one considers a single case. However, its reliability as a foundation essentially dissipates as the number of cases increases and the virtual certainty of recovery in many of them increases with it. That Greitzer & Locks itself should not have moved on its own to ameliorate what appears to me a very questionable overall fee arrangement suggests a mercenary approach inconsistent with the duty of fair representation. While plaintiffs may lose a little in time in securing new representation, their likelihood of benefitting in the end is at least as great as the hypothetical loss from having Greitzer & Locks disqualified as their representatives.

Along the same lines consider the awkwardness of the approach taken by Greitzer & Locks to the present appeal. The firm did not, as far as the record discloses, even consult a single client as to whether the appeal should be lodged. The appeals were simply filed in the name of the law firm itself. The indication again is strong that the lawyers' welfare took precedence in the minds of Greitzer & Locks over the welfare and interest of the clients. We have made no point of the possible lack of jurisdiction deriving from the want of a proper party appellant. Generally the rules are applied very liberally so as

not to cost a party his day in court. Nevertheless, the contention was vigorously advanced by appellees, yet could have been eliminated in advance by the simple expedient of obtaining the consent of at least one and perhaps several appellants. That indicates a lack of that thoroughness which we generally associate with first-rate counsel.

Greitzer & Locks put forward as an extenuation the consideration that, with the number of its asbestosis clients well in excess of 1000, it would impose an impossible burden to require it to obtain authorizations to appeal from each plaintiff. However, that argument is not available in the usual case involving only one or at most a handful of would-be appellants, and it really boils down, therefore, to a clear demonstration that, by undertaking representation of such a large number of parties, Greitzer & Locks confessedly has given and has been content to give to each plaintiff less thorough representation than if it had restricted the number of representations it sought to undertake in the same area.

This is not an entirely trivial observation. The case belongs to the client, not to the lawyer. It is not beyond the realm of possibility that one or more individual plaintiffs, had they been asked and fully informed of their alternatives, as

they were entitled to expect, might have decided that they wished to take advantage of the existence of the disqualification order in the district court to substitute other counsel more qualified, in the minds of the plaintiffs at least, to present their case in the strongest most effective fashion.

Accordingly, I would affirm the decision promulgated by the three district judges.[5]

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5 It will, perhaps, not go unobserved that I have omitted referring to the American Bar Association's Code of Professional Responsibility as a source of support for my conclusion. The ABA Code is but one set of moral standards, albeit one worthy of close attention and not lacking in persuasive authority. The point is that the result arrived at by the district court should be affirmed even had no ABA Code existed.